ORIGINAL

NO. 09-1619

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR SUMMIT COUNTY, OHIO
NO. 21906

STATE OF OHIO
Plaintiff-Appellant

-vs-

DENNY ROSS
Defendant-Appellee

MEMORANDUM OF APPELLEE OPPOSING JURISDICTION

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STATEMENT OF APPELLEE AS TO WHETHER LEAVE TO APPEAL SHOULD BE GRANTED

Appellant's position regarding whether a substantial constitutional question is involved or whether the case is of public or great general interest.

Appellant claims that this case warrants this Court's review for two reasons:

1. The 9th District misapplied the law and determined that the denial of Crim.R.29(C) acquittal motion is interlocutory and subject to reconsideration "at any time" (Appellant's Memorandum in Support of Jurisdiction, p.2); and
2. A rule that allows for reconsideration of an order denying a Crim.R.29(C) motion outside of the fourteen day window imposed by the rule destroys any concept of finality in criminal cases.

The issue decided below was clearly drawn by the 9th District. The issue decided was "once a trial court has denied a motion for acquittal that was properly filed within 14 days after the jury was discharged following a mistrial, does the trial court have authority to reconsider that denial." *State v. Ross*, Summit App. No. 21906, 2009-Ohio-3561, at p.7.

Appellant has stated to this Court that when the Court of Common Pleas renders an acquittal far outside the express confines of Crim.R.29(C), it acts without jurisdiction and the resulting judgment is not a verdict at all and thus there is no bar to appeal by the state pursuant to R.C. 2945.67(A). The Appellant states that the Court below ignored *Carlisle v. U.S.* (1996), 517 U.S. 416, 116 S.Ct. 1460, which held that a district court has no authority to grant a post-verdict Crim.R.29(C) motion for acquittal outside the time limits of the rule.

Appellant overlooks the fact that in this case, all parties agree that a timely motion was filed and a timely motion was renewed in this case. *Carlisle* is not controlling here, Mr. Carlisle filed his Crim.R.29 motion one day late.

As to its second reason, Appellant recites to this Court as justification for jurisdiction that the decision below destroys any concept of finality. Appellant makes this argument for the first time before this Court. Aside from any waiver argument, the argument likewise does not raise this case to a case warranting this Court's jurisdiction. The Appellant here violates the concept of finality. The judgment of acquittal rendered herein is not subject to review. It is simply not appealable by the state as a matter of right or by leave to appeal. R.C. § 2945.67.

In summary, this is not a case where the Court of Appeals misapplied very clear and unambiguous language in a statute. The law applied in this case is clear and the Court below applied the law appropriately and followed the lead of the 8th District in *State v. Abboud*, 8th Dist. No. 80318, 80325, 2002-Ohio-4437 and the 4th District in *State v. Ward*, 4th Dist. No. 03CA2, 2003-Ohio-5650.

LAW AND ARGUMENT

APPELLANT'S PROPOSITION OF LAW:

THE COURT OF COMMON PLEAS LACKS JURISDICTION TO GRANT AS UNTIMELY CRIM.R.29(C) MOTION FOR ACQUITTAL BECAUSE CRIM.R.45(B) BARS "ANY ACTION" NOT EXPRESSLY PROVIDED FOR BY CRIM.R.29(C) AND ANY ORDER PURPORTING TO GRANT ACQUITTAL OUTSIDE THE CONFINES OF CRIM.R.29(C) IS VOID AND UNENFORCEABLE.

APPELLEE'S POSITION

1. The Appellee in this case did not prosecute an untimely Crim.R.29(C) motion. The motion was filed within the time constraints of Crim.R.29(C). Because of the double jeopardy motions pending and all of the litigation surrounding that issue, the parties and the Court on May 22, 2001 agreed to hold any action on the Crim.R.29(C) in abeyance. The prosecutor at that time, Mr. Marino, was asked by the Judge if he had any problems with that and he said "none whatsoever, Your Honor".

Most importantly, a verdict of acquittal is irreversible, *Sanabria v. U.S.*, 437 U.S. 54, 98 S.Ct. 2170, even if the legal rulings underlying the acquittal were erroneous, *Sanabria*, 98 S.Ct. 2179; even if based upon an egregiously erroneous foundation, *U.S. v. Martin Linen Supply, et al.*, 43 U.S. 564, 97 S.Ct. 1349 at 1354; or involved a severe abuse of discretion, *U.S. v. DeFrancesco*, 449 U.S. 117, 101 S.Ct. 426 at 433; or an error of law, *Arizona v. Rumsy*, 467 U.S. 203, 104 S.Ct. 2305 at 2310.

The Appellant relies heavily on *Carlisle v. U.S.* (1996), 517 U.S. 416, 116 S.Ct. 1460. In *Carlisle*, the Crim.R.29(C) motion was filed late. The U.S. Supreme Court found that such late filing was determinative. The trial court in Carlisle initially denied the defendant's late motion for acquittal and reconsidered and granted it before sentencing. As the 9th District decision in this case states:

> "Neither the majority opinion nor the concurring opinion, however, includes a suggestion that, regardless of whether the trial court could have granted the defendants post verdict motion for acquittal at the time it was filed, it was without authority to reconsider it once it had denied that motion. Admittedly, it is dangerous to read too much into things not said in United States Supreme Court decisions, but if such a suggestion were there, it would lend credence to the state's position, but it is not."

See *Ross*, supra, at p.9

Appellant also argue that Crim.R.45(B) prohibits the action in this case. Crim.R.45(B) proscribes:

> The Court may not extend the time for taking any action under Rule 23, Rule 29, Rule 33 and Rule 34 except to the extent and under the conditions stated in them.

It is clear then that Crim.R.45(B) prohibits the trial court from extending any time limit in Crim.R.29(C) except to the extent and under the conditions stated in the rule.

Crim.R.29(C) states that a motion for acquittal may be made or renewed within fourteen days after the jury is discharged. The parties here agreed, and the record reflects that the Crim.R.29 motion was properly made during that fourteen day period. The only time proscription in Crim.R.45(B) has to do with this fourteen day time limit for the filing of the motion. The Court did nothing to extend that fourteen day rule. Appellee filed timely.

Appellant argues that Crim.R.45(B) somehow impacts on the interlocutory nature of a denial of a motion for acquittal. Ohio law is clear that a trial court's denial of Mr. Ross' renewed motion for acquittal was not a final judgment. It did not "in effect, determine the action and prevent a judgment." R.C. 2505.02(B)(1). The 9th District so found and joined the 8th District in *State v. Abboud*, supra and the 4th District in *State v. Ward*, supra.

2. Finally, Appellant argues to this Court that this case sidesteps the fourteen day time limit of Crim.R.29 and thus severely undermines the need for finality in criminal cases. Appellant makes this argument for the first time here. Ordinarily, a reviewing court will not consider a new theory not introduced in the lower court and will not consider questions that could have been, but were not presented before the Court whose judgment is sought to be reversed. *State, ex rel. Porter v. Cleveland Dept. of Public Safety*, 84 O.S.3d 258. Aside from any waiver argument, Appellant argues that this motion was decided months or years after the time limit for such a ruling expired (Appellant's Memorandum, p.12). First of all, as already argued above, the only time limitation in Crim.R.29 relates to the filing of such motion, not to any ruling. Is Appellant now arguing that not only must the Crim.R.29 motion be filed within fourteen days, but the court must also rule within that time? Also, Appellant argues that:

> "Just as an appellate court is ill-suited to evaluate a cold-trial record in the same fashion as the fact finder who hears the evidence, it necessarily follows that a successor judge is also generally ill-suited to the same task based on the same cold record."

The logical expansion of this argument clouds, on constitutional terms, the reliability of any de novo review afforded by this Court, the district courts of appeal, and any successor judge. To say a successor judge or an appellate court is "ill-suited" to evaluate evidence calls into question the very reliability of our appellate system.

Appellant's finality argument further ignores its own consent to the postponement of any ruling pending the outcome of the double jeopardy litigation. As stated above, the Appellant consented to holding any ruling on the Crim.R.29 motion in abeyance during this litigation.

SUMMARY

Appellant advances two arguments as to why this Court should accept jurisdiction in this case.

As pointed out in his Memorandum, a verdict of acquittal is simply unrevieweable. Accordingly, even if the trial court had erred in acquitting Appellee, the ruling is not subject to review.

Appellee's motion for acquittal was timely filed, despite the repeated statement of Appellant to the contrary. The motion for acquittal was submitted less than one week after the jury discharge. This case then entered litigation regarding the jeopardy claims of Appellee. The trial judge specifically reserved ruling on the Rule 29 motion with the consent of all parties. The trial judge denied the Rule 29 motion on September 10, 2003, two days later, Appellee submitted supplemental briefs and additional supplemental briefing prior to the court's ruling.

Motions for reconsideration of interlocutory rulings are permissible. Appellant below recognized that motions for reconsideration of interlocutory orders at the trial level are appropriate. See eg. *Pitts v. Dept. of Transportation* (1981), 67 O. St.2d 378. The denial of a Rule 29 motion for acquittal following a declaration of a mistrial is an interlocutory order. *State*

v. Alderman (Dec. 11, 1990), Athens App. No. CA 1433, 1990 WL 253034 citing *Richardson v. US* (1984), 468 US 317.

For all the above reasons, it is apparent that the Court of Appeals did not misapply clear statutory language in Crim.R.29(C) and Crim.R.45(B). The decision below that the denial of a motion for a judgment of acquittal is interlocutory has a sound basis in law. Such a ruling does not destroy any concept of finality because Appellant consented to delay in the ruling and the delay was not prohibited by the language of Crim.R.29(C). For these reasons, this case does not warrant review by this Court.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a copy of the foregoing has been mailed by regular U.S. Mail this 17 day of December, 2009, Matthew E. Meyer, Attorney for Appellant, The Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113.

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